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**FEDERAL COMMUNICATIONS COMMISSION**  
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In the Matter of: )

Communications Assistance for Law )  
Enforcement Act )  
\_\_\_\_\_ )

CC Docket No. 97-213

**COMMENTS REGARDING THE COMMISSION'S AUTHORITY**  
**TO EXTEND THE OCTOBER 25, 1998 COMPLIANCE DATE**

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## **SUMMARY**

In its April 20, 1998 Public Notice, the Commission requested comments on the issues raised by several petitions filed with the Commission concerning the Communications Assistance for Law Enforcement Act ("CALEA" or "the Act"). The Commission specifically asked commenters to address the request, made by some of these petitioners, that the Commission declare an industry-wide extension of the deadline for compliance with the Act's law enforcement assistance obligations beyond the October 25, 1998 date set by Congress.

The language and structure of CALEA offer no support for the assertion that the Commission has the authority to announce an industry-wide extension of the compliance deadline set by Congress. Petitioners' arguments to the contrary are premised on a fundamental misunderstanding of the Act. The basic premise of petitioners' arguments is that members of the telecommunications industry may be excused from compliance with CALEA's law enforcement assistance obligations unless and until a "stable" "safe harbor" method of compliance becomes available. But the Act's core law enforcement assistance obligations are in no way dependent upon the stability — or even the existence — of a "safe harbor" method of compliance.

The fact that the Commission has no authority to announce the industry-wide extension that petitioners seek will not create any unreasonable burdens for the industry or the Commission. The Department of Justice has already begun negotiating with the industry to enter into enforcement forbearance agreements whereby the government will agree to refrain from bringing CALEA

enforcement actions in return for a carrier's or manufacturer's agreement to come into compliance with CALEA in an agreed-upon, reasonable time.

Congress passed CALEA to ensure that the government would be able to conduct court-authorized surveillance which is crucial to effective law enforcement, and provided a date certain by which this public benefit would become available. The Commission should decline the petitioners' invitation to take unnecessary and unauthorized action that will push the realization of this exceptionally important public safety goal years into the future.

## I. INTRODUCTION

1. In its Public Notice of April 20, 1998 (In the Matter of: Communications Assistance for Law Enforcement Act, CC Docket No. 97-213 ("FCC Public Notice")), the Commission requested comments on the petitions filed by the Department of Justice and the Federal Bureau of Investigation ("FBI"), as well as several telecommunications carriers and other entities, regarding various matters pertaining to the Communications Assistance for Law Enforcement Act. The Commission requested specific comments regarding "the issues raised concerning compliance with CALEA obligations, including any extension of the October 1998 compliance date" set by the statute, and asked commenters to address the possibility of the Commission issuing "an extension order that applies to all carriers subject to the compliance deadline." FCC Public Notice at 4.

2. As we explain below, Congress itself set the effective date by which the telecommunications industry must comply with the key provision in the statute. In doing so, Congress recognized the crucial importance of guaranteeing that law enforcement will be able to conduct effective electronic surveillance, which is an absolute necessity for fighting crime in the digital age. At the same time, Congress recognized the possibility that compliance could create hardships for the industry, and for this reason enacted a series of provisions designed to grant temporary relief to individual industry participants in appropriate circumstances. What Congress did not do in this detailed legislative scheme was to authorize the Commission to alter CALEA by granting the industry-wide extension being sought by petitioners.

3. The petitioners' request for an industry-wide extension is a request for the Commission to go beyond its statutorily-granted powers and override the timing and individual extension provisions in CALEA. Obviously, the Commission has no authority to take such a step; the Supreme Court has made clear that the Commission cannot exceed its statutory mandate. See, e.g., MCI Telecomm. Corp. v. AT&T, 512 U.S. 218 (1994) (rejecting the Commission's claim of authority to declare tariff filing optional for all non-dominant long-distance carriers because the plain language of the relevant statute made tariff filing mandatory for all common carriers).

4. In these comments, the Department of Justice and the FBI describe the statutory scheme that Congress enacted, and we analyze in turn the various compliance and extension provisions. None of them grants industry-wide extension authority. In addition, we explain why we are confident that no such industry-wide extension is necessary to ensure that the critical public safety objectives and obligations of CALEA are met in a manner that is timely, in the public interest, fair to all affected industry participants, and convenient for the industry and the Commission. The Commission should note that the petitions filed have failed to establish, beyond bald assertions, the actual need for an industry-wide extension. These petitions thus ask the Commission to take a serious step at odds with the critical needs of law enforcement without the necessary factual support.

5. Finally, the Commission should bear in mind that petitioners do not seek to delay actual compliance with § 103 by two years only — rather, one petitioner has actually requested the Commission effectively to declare the Act a nullity by "indefinitely" suspending § 103's effective date (Petition for Rulemaking of Center for Democracy and Technology ("CDT Petition") at 5).

while two others seek a declaration that § 103 will take effect only after two years plus the amount of time necessary for the Commission to complete its rulemaking (see Petition for Rulemaking of the Telecommunications Industry Association ("TIA Petition") at i; Response to Petition for Rulemaking of Cellular Telecommunications Industry Association ("CTIA Response<sup>1</sup>") at 12-13). Given the arguments on which the latter two petitioners rely, it is quite likely that they will claim an exemption from compliance with § 103 even after the time necessary for the Commission's rulemaking plus two more years have passed. As we discuss below, these petitioners make the (unsupported) argument that they have no obligation to comply with § 103 until a "stable" "safe harbor" method of compliance is available to them. Thus, if the Commission's final rule were to be challenged in court, petitioners will likely claim that they must continue to be excused from compliance with § 103 until all such legal challenges have been finally resolved in the courts. There is simply no telling how far into the future the achievement of Congress's public safety objectives in passing CALEA would be deferred under these petitioners' reading of the statute.

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<sup>1</sup> Although the Commission's Public Notice referred only to the initial Petition for Rulemaking filed by the Cellular Telecommunications Industry Association, we also address the arguments presented in the CTIA Response because that filing is considerably more recent and takes into account present circumstances, such as the issuance of the industry's safe harbor standard and the filing of a Petition for Rulemaking by the Department of Justice and the FBI.

**II. CALEA DOES NOT AUTHORIZE THE COMMISSION TO GRANT AN INDUSTRY-WIDE EXTENSION OF THE STATUTORY DEADLINE FOR COMPLIANCE WITH § 103, THE KEY PROVISION IN THE STATUTE REQUIRING THE INDUSTRY TO ASSIST LAW ENFORCEMENT IN CONDUCTING AUTHORIZED INTERCEPTIONS.**

**A. The Statutory Scheme Created by Congress**

6. Through CALEA, Congress established certain requirements that the telecommunications industry must meet so that law enforcement officials can continue to conduct effective electronic surveillance despite changes in telecommunications technology. Those requirements are set out in § 103 of the statute. Congress provided for the assistance capability requirements of § 103 to take effect four years after the Act's enactment, providing an effective date of October 25, 1998. See § 111(b); FCC Public Notice at 2. Thus, Congress itself established the date by which the telecommunications industry must meet reasonable law enforcement needs, and gave the industry ample warning and lead time to fulfill that statutory obligation. An analysis of the statutory scheme reveals that Congress studiously avoided imposing any unreasonable obligations on the telecommunications industry in setting § 103's requirements and effective date. Congress inserted a number of provisions designed to prevent unreasonable hardships from befalling industry participants in individual instances. The specific means whereby compliance with CALEA is to be achieved are left to individual industry participants, and Congress sought to give industry participants considerable discretion in deciding how to achieve compliance by October 25, 1998. However, the statute's plain language belies any claim that Congress additionally gave the

Commission the authority, as a blanket matter, to override the Act's timing and case-specific extension provisions.

7. In designing CALEA, Congress took great care to ensure that telecommunications carriers would not be unfairly burdened or inconvenienced by the obligation to comply with the law enforcement assistance capability requirements of § 103. Congress gave the telecommunications industry four years to develop solutions to meet these requirements, ensured that carriers would have the freedom to choose whatever methods of compliance they preferred, "grandfathered" pre-installed equipment (and even equipment installed over two months after the Act's passage), provided that the assistance capability requirements would apply to a carrier's equipment only to the extent that compliance is "reasonably achievable" (with financial support from the Attorney General, if necessary), and authorized the FCC to grant an extension of up to two years to any individual carrier for which compliance is not "reasonably achievable" within the compliance period. It also required courts dealing with requests for enforcement orders against specific industry participants to take into account the reasonable achievability of the requested law enforcement assistance and the carrier's good faith in regard to the compliance obligations. Finally, Congress required that even a carrier that has not proceeded in good faith be given a "reasonable time and conditions for complying" with any enforcement order. Congress did not give the Commission the authority to relieve the entire telecommunications industry of its statutory responsibilities.

8. Congress also included in CALEA a procedure designed to lead to the eventual publication of a specific framework for compliance with § 103 that would establish a "safe harbor" for carriers

(i.e., a carrier that implements this framework will thereby be in compliance with § 103). § 107(a). In December of 1997, the Telecommunications Industry Association and Committee T1, sponsored by the Alliance for Telecommunications Industry Solutions, announced the adoption and joint publication of an interim industry standard known as "J-STD-025." FCC Public Notice at 2. J-STD-025 qualifies as a set of "publicly available technical requirements or standards adopted by an industry association or standard-setting organization \* \* \* to meet the requirements of section 103" (§ 107(a)(2)). Therefore, J-STD-025 currently serves as a safe harbor for carriers. Use of this safe harbor method of compliance is purely voluntary — no carrier or manufacturer is required to implement the industry's safe harbor standards. See CTIA Response at 13 ("The 'safe harbor' standard contemplated in CALEA is purely voluntary"). If the safe harbor standards designed by the industry are deficient, the Attorney General can ask the Commission to set a superseding safe harbor (§ 107(b)), which she has done, but the industry's safe harbor remains in place until it is superseded by the Commission's final rule.

9. Significantly, in CALEA, Congress did not make the effective date of § 103 and the industry's compliance obligation dependent upon the 'finality' — or even the existence — of such safe harbor standards. To the contrary, in § 107(a)(3) Congress specifically declared that "[t]he absence of technical requirements or standards for implementing the assistance capability requirements of section 103 shall not \* \* \* relieve a carrier, manufacturer, or telecommunications support services provider of the obligations imposed by section 103 \* \* \*" (emphasis added). See also H.R. REP. NO. 103-827, pt. 1, at 27 (1994), reprinted in 1994 U.S.C.C.A.N. 3489, 3507 ("[T]he absence of standards will not preclude carriers, manufacturers, or support service providers from deploying a

technology or service, but they must still comply with the assistance capability requirements") (emphasis added); Petition for Rulemaking of the Cellular Telecommunications Industry Association ("CTIA Petition") at 3 ("Section 107(a)(3) of CALEA provides that the absence of a standard or technical requirements does not relieve a carrier from its obligations under Section 103").

10. While it thus clearly required that § 103's obligations will take effect with or without a safe harbor method of compliance, Congress also built an array of protective measures into the Act to ensure that compliance with § 103 would pose no unfair hardship for individual industry participants, regardless of whether safe harbor standards were available to them.

11. First, to afford individual carriers discretion in developing their § 103 compliance solutions. Congress prevented law enforcement agencies and officers from requiring or prohibiting any specific "design of equipment, facilities, services, features, or system configurations." § 103(b)(1).

12. Second, Congress "grandfathered" all equipment, facilities, and services installed or deployed on or before January 1, 1995, and authorized the Attorney General to pay additional reasonable costs necessary to bring this equipment into line with CALEA's requirements. See § 109(a).

13. Third, Congress sought to ensure that § 103 would create no unnecessary impediment to technological innovation by providing that any equipment, facility, or service installed or deployed after January 1, 1995 will not have to be brought into compliance with § 103 if the Commission determines, on petition from a carrier or other interested person, that compliance with regard to that

equipment is not "reasonably achievable." § 109(b)(1). This determination is governed by several enumerated factors (see id. (b)(1)(A) - (b)(1)(K)), and involves a balancing of the central public safety purposes of CALEA against the extent to which "compliance would impose significant difficulty or expense on the carrier or on the users of the carrier's systems." Id. The Act authorizes the appropriation of \$500 million to be used to assist carriers in bringing "grandfathered" equipment, and equipment for which compliance would not otherwise be "reasonably achievable," into compliance with § 103. See § 110.

14. Fourth, Congress authorized the Commission, following a consultation with the Attorney General, to grant carrier-specific extensions of the compliance date for the amount of time necessary for a petitioning carrier to achieve compliance (up to a maximum term of two years) whenever the petitioning carrier can demonstrate that, with regard to particular equipment, facilities, or services installed or deployed before § 103's October 25, 1998 effective date, compliance is "not reasonably achievable through application of technology available within the compliance period." § 107(c).

15. Fifth, in specifying the manner in which the obligation to comply with § 103 will be enforced, Congress built even further protections into the Act for industry participants that have made good faith compliance efforts. A court may not issue an order enforcing § 103's obligations against a particular carrier if alternative means for conducting the interception are available to law enforcement. § 108(a)(1). Nor may a court issue an enforcement order if it finds that compliance with the Act is not "reasonably achievable" for the carrier (unless the carrier's own failure to take timely action is the reason that compliance is not reasonably achievable). § 108(a)(2).

16. Sixth, even a carrier for which compliance was "reasonably achievable," and which nevertheless failed to take timely action to achieve compliance (and which therefore may be subject to an enforcement order), must be given a "reasonable time and conditions for complying with [the] order." Determination of what constitutes a "reasonable time" is to be made with reference to any good faith compliance efforts the carrier may have made, the effect of compliance on the carrier's ability to continue doing business, the carrier's degree of culpability or delay in regard to the compliance obligation, and "such other matters as justice may require." § 108(b).

17. One petitioner seeks to characterize the Act's monetary penalty provision as an imminent threat that will menace all carriers as soon as § 103's effective date passes. See CTIA Response at 11 n.24; CTIA Petition at 3. But in reality, a carrier can be subjected to monetary penalties only after that carrier has been ordered to comply with § 103 by a court, and has refused to obey the court's order — despite having been given a "reasonable time and conditions for complying with [the] order." § 201. Even then, a court must take into account several enumerated factors, such as the carrier's ability to pay and degree of culpability, in determining whether to impose the monetary penalty and how large the penalty should be. Id.

18. Thus, an examination of CALEA's structure shows that Congress went to great lengths to ensure that the obligation to comply with § 103 by October 25, 1998 would create no unfairness or undue burdens for individual industry participants regardless of whether a safe harbor method of compliance was established by that date. Congress did not, however, grant the Commission or any other entity the authority to change the statutory compliance date of October 25, 1998 for the

industry as a whole. This point is important because, as the Commission well knows, the industry is not monolithic. Different manufacturers and carriers have different capabilities and needs — a fact that Congress obviously recognized when it designed the Act's individualized extension mechanism and restrictions on enforcement orders.

19. As noted above, Congress did give the telecommunications industry the first opportunity to develop safe harbor standards, by providing that compliance with "publicly available technical requirements or standards adopted by an industry association or standard-setting organization" would shield carriers unless and until the Commission issued a final rule supervening the industry's standards. § 107(a)(2). Congress did not, however, require that any industry organization publish safe harbor standards, and if no organization did so, or if the industry's standards were considered "deficient" by a government agency or any other person, CALEA provides that the agency or person could petition the Commission to fill the void (or correct the deficiency) by issuing a rule establishing a supervening safe harbor. § 107(b). Such a rule would be required to: "(1) meet the assistance capability requirements of section 103 by cost-effective methods; (2) protect the privacy and security of communications not authorized to be intercepted; (3) minimize the cost of such compliance on residential ratepayers; (4) serve the policy of the United States to encourage the provision of new technologies and services to the public; and (5) provide a reasonable time and conditions for compliance with and the transition to any new standard, including defining the obligations of telecommunications carriers under section 103 during any transition period." *Id.* The Act does not require any party to submit a petition for a rulemaking under § 107(b), nor does it set any deadline for the submission of such a petition.

20. Section 107(b)(5) sets forth the last of the characteristics required of a safe harbor rule issued by the Commission. This section provides that, if an industry organization has issued safe harbor standards, those carriers that have chosen to achieve § 103 compliance in accordance with those standards, and that wish to continue complying with § 103 by remaining within a safe harbor, would be governed by transition-period provisions to be incorporated into the Commission's final rule. § 107(b)(5). These transition-period provisions must give these carriers "reasonable time and conditions" for making any necessary alterations, and must specify what these carriers must do to ensure that they are still in compliance with § 103 while making the transition to the Commission's rule.

**B. The Petitions Requesting Modifications of CALEA's Obligations**

21. The petitions on which the Commission has requested comments identify no provision of CALEA authorizing the Commission to create industry-wide alterations of § 103's effective date, and no such provision exists. The grant of an industry-wide extension would be fundamentally contrary to the clear intent of Congress as expressed in the language and structure of the Act, and would be disastrous from the perspective of law enforcement's ability to protect the public from criminal activity, particularly in the areas of organized crime, drug trafficking, violent crime, and domestic terrorism. There is no doubt that the Commission, like any executive agency, may not exercise authority that is contrary to the plain language of the relevant statute. See, e.g., MCI Telecomm. Corp. v. AT&T, 512 U.S. 218 (1994).

22. A few of the petitions claim that the Commission's authority to override the effective date of § 103 specified by Congress can be found in § 107(b)(5). See TIA Petition at 2; CTIA Response at 13. It cannot. As explained above, § 107(b)(5) sets out the last of five enumerated characteristics required of any rule that the Commission may develop pursuant to a § 107(b) rulemaking petition.<sup>2</sup> This section specifies that such a rule should include provisions governing the transition period for any carrier that has chosen to comply with § 103 by means of the industry's safe harbor, and that seeks to continue to comply by means of a safe harbor after the Commission has issued its supervening rule. To the extent that § 107(b)(5) can be said to grant the Commission any authority (as opposed to circumscribing the Commission's authority), that authority exists only in the context of the transition from industry standards found to be deficient to different, Commission-set standards defining the parameters of the optional safe harbor method of compliance with § 103. Section 107(b)(5) has no application to § 103's underlying mandatory compliance requirement itself.

23. One petitioner suggests, in a footnote, that § 107(c) gives the Commission the authority to announce an industry-wide extension. See CTIA Response at 13 n.30; see also CTIA Petition at 13 n.7. But § 107(c) by its terms provides for the grant of extensions to individual carriers and on individual petitions. Section 107(c) specifies that "[a] telecommunications carrier" may petition for an extension (§ 107(c)(1) (emphasis added)), that each individual extension shall be just long enough "for the carrier to comply" (up to a two-year maximum) (§ 107(c)(3) (emphasis added)), and that the

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<sup>2</sup> Section 107(b)(5) provides that the rule that a government agency or other person petitions the Commission to establish should "provide a reasonable time and conditions for compliance with and the transition to any new standard, including defining the obligations of telecommunications carriers under section 103 during any transition period."

extensions "shall apply to only that part of the carrier's business on which the new equipment, facility, or service is used" (§ 107(c)(4) (emphasis added)). See also H.R. REP. NO. 103-827, pt. 1, at 18-19 (1994), reprinted in 1994 U.S.C.C.A.N. 3489, 3498-99 ("H.R. 4922 \* \* \* allows any company to seek from the FCC up to a two year extension of the compliance date if retrofitting a particular system will take longer than the four years allowed for compliance") (emphases added). Granting an industry-wide extension pursuant to § 107(c) would contravene that provision's plain terms.

24. Another theory advanced in this same petitioner's footnote is that § 301, which authorizes the Commission to "prescribe such rules as are necessary to implement" the Act's requirements, creates the authority to override the effective date specified by Congress and substitute a new one. See CTIA Response at 13 n.30. But § 301 grants the Commission the authority to prescribe only such rules as are necessary to implement the requirements of the Act — it creates no authority to prescribe rules that will contravene the requirements of the Act, as would a rule pushing more than two years into the future the privacy protection and law enforcement assistance benefits that Congress declared would begin accruing on October 25, 1998.

25. Another petitioner asserts that § 109(b) vests the Commission with the authority to "indefinitely delay implementation" of the Act. CDT Petition at 5. But § 109(b) certainly does not give the Commission the authority to declare the Act a nullity in this way, even temporarily. Rather, a § 109(b) determination applies only "with respect to [the] equipment, facility, or service installed or deployed after January 1, 1995" that is the subject of a petition from a carrier or other interested

person. Furthermore, § 109(b) has nothing to do with the time frame for compliance with § 103. Pursuant to § 109(b), the Commission is to implement Congress's objective of ensuring that the Act does not impede technological innovation by exempting from § 103 technologies for which compliance is not reasonably achievable, except to the extent that the Attorney General pays for necessary upgrades. Section 109(b) creates no authority to make declarations on an industry-wide basis, or to alter the required time frame for industry compliance.

26. The main thrust of the arguments that petitioners have advanced in support of an industry-wide extension is a practical one: they argue that such an action is necessary because the prospect of the Commission eventually issuing a rule that will supervene J-STD-025 has rendered the safe harbor method of compliance "uncertain." See TIA Petition at 5-6; CTIA Response at 11; CTIA Petition at ii & n.2. Even if such a concern had force, reading an industry-wide extension provision into the Act would nevertheless be fundamentally contrary to the language and structure of CALEA. Congress foresaw the possibility that an industry-created safe harbor standard would be challenged as "deficient," eventually resulting in the Commission's issuance of a rule supervening the industry's safe harbor standards. As explained earlier, realizing that, for those carriers that had chosen to comply with § 103 by implementing the industry's safe harbor standards, adjusting to any modifications in the standards introduced by the Commission's rule would require time and effort, Congress expressly directed the Commission to include in its superseding rule provisions establishing a "reasonable time and conditions" for this "transition." § 107(b)(5). In short, there is simply no authority or justification for writing new provisions into the Act to address the hardship alleged by petitioners, because Congress itself addressed this possible hardship through the transition

period regulation requirement in § 107(b)(5). The industry's J-STD-025 currently provides a safe harbor for industry participants, and will continue to do so until the Commission issues a final rule supervening J-STD-025. At that time, the time frame and interim safe harbor requirements for those carriers that have implemented J-STD-025 will be governed by transitional provisions incorporated into the Commission's final rule pursuant to § 107(b)(5).

27. Petitioners' primary misperception regarding the Act is that the assistance capability requirements of § 103 are somehow dependent upon the existence of a "stable" or "certain" safe harbor. As noted above, this proposition is directly contrary to Congress's clear statement that even the absence of any safe harbor does not excuse compliance with § 103. See § 107(a)(3). Indeed, the Act does not mandate that any safe harbor be created at all. The industry's creation of a safe harbor is purely voluntary, and if the industry had declined to issue any safe harbor standards, the Act would not have required the Commission to fill the vacuum with a rule. While it is clear that Congress inserted the procedure for generating and modifying the safe harbor standard in order to facilitate compliance, nothing could be clearer than that the assistance capability obligations at the Act's core function independently of the safe harbor protocol. It is ironic that the petitioners have sought to use a provision that Congress enacted in order to make § 103 compliance easier as a justification for creating a years-long delay in § 103's effective date.

### **III. AN INDUSTRY-WIDE EXTENSION IS NOT NECESSARY TO AVOID UNDUE ADMINISTRATIVE BURDENS IN THE IMPLEMENTATION OF CALEA.**

28. Two petitioners warn the Commission that it must either find the authority to grant an industry-wide extension of the deadline for compliance with § 103, or be deluged with extension petitions that it will have to evaluate individually. See TIA Petition at 10; CTIA Response at 12; CTIA Petition at 13 n.7. But this possibility does not justify the industry-wide extension that petitioners seek (which, as we have shown above, would be unauthorized in any event).

29. Petitioners, who have direct access to the information necessary to determine whether compliance with § 103 by October 25, 1998 is achievable, have presented the Commission with no evidence showing that it is not, relying instead upon bare assertions that industry participants are unable to achieve compliance by that date. Such bare assertions cannot definitively establish that there is a crisis in the industry regarding compliance (and in any event, any such crisis would have to be addressed by Congress through amendment of CALEA, rather than by the Commission).

30. One petitioner has asked the Commission to issue a rule that will remove capabilities from the industry's standard (see CDT Petition), and it is theoretically possible that the Commission's rule will do so. However, this would only mean that, when the Commission issues its rule, a carrier that has implemented the industry's standard will have the option of discontinuing some law enforcement assistance capabilities that the industry believed were reasonable and consistent with the Act, while still remaining within the safe harbor. The carrier will not be required to remove these capabilities.

any more than it was required to choose the safe harbor method of compliance in the first place. Thus, this possibility does not logically support a change in CALEA's effective date. Cf. CTIA Response at 11.

31. The Department of Justice and the FBI recognize that some carriers will claim that they are not prepared to achieve compliance with § 103 by October 25, 1998. We believe that this type of individual hardship can nevertheless be dealt with practically and legally. The Department of Justice has already conducted extensive discussions with the industry regarding the negotiation of forbearance agreements between the Department and individual manufacturers and their customers. These agreements likely would prevent the Commission from being deluged with extension petitions. Pursuant to such forbearance agreements, the Department of Justice will assure manufacturers and carriers that they will not be subject to federal enforcement actions under § 108, in return for the manufacturers' and carriers' assurance that they will develop and use equipment meeting the assistance capability requirements of § 103 in an agreed-upon, reasonable time.<sup>3</sup> The Attorney General has already made clear to the telecommunications industry and to the Commission her willingness to enter into such forbearance agreements. See January 22, 1998 Letter from Attorney General Reno to Matthew J. Flanigan (Attachment A to these comments) at 1:

In those situations where [a] carrier can foresee that it will not be able to meet the deadline because the manufacturer has yet to develop the solutions, the FBI is prepared to enter into an agreement with the manufacturer of the carrier's equipment

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<sup>3</sup> In addition to authorizing the initiation of an enforcement proceeding by the Attorney General, the Act permits enforcement of § 103 in the context of requests for assistance by state law enforcement officials. See § 201. However, the Attorney General will make every effort to ensure that such enforcement actions do not conflict with such agreements by communicating with state officials.

wherein both parties \* \* \* would agree upon the technological requirements \* \* \* and a reasonable and fair deployment schedule which would include verifiable milestones. In return, the Department will not pursue an enforcement action against the manufacturer or carrier as long as the terms of the agreement are met in the time frames specified. The Department will not pursue enforcement action against any carrier utilizing the switch platform (or non-switch solution) named in the agreement.

32. On January 23, 1998, representatives of the Department of Justice and the FBI met with representatives of the Cellular Telecommunications Industry Association, the Personal Communications Industry Association, the Telecommunications Industry Association, the United States Telephone Association, and Bell Atlantic Corporation. to discuss the procedure for entering into such forbearance agreements. The substance of these discussions is summarized in a February 3, 1998 letter from Stephen R. Colgate, the Department of Justice's Assistant Attorney General for Administration, to Tom Barba of Steptoe & Johnson (Attachment B to these comments). The letter explains that a manufacturer seeking forbearance from CALEA enforcement actions for itself and the carriers it serves may submit to the FBI's CALEA Implementation Section a statement specifying: (i) the assistance capabilities that it will incorporate into its system; (ii) the projected date of availability of these capabilities; (iii) a timeline with "milestones" for development of these capabilities; (iv) a schedule for reporting to the FBI as each of the "milestones" is reached; (v) a list of the type of information that will be reported; (vi) a schedule for providing cost data to the government; and (vii) a list of the type of cost data to be provided. See Colgate letter at 4. The FBI and industry participants have already begun circulating draft "agreements in principle" implementing the planned forbearance agreement system. See id. at 6.

33. This mechanism of forbearance agreements should make unnecessary any wave of extension petitions to the Commission, by enabling any manufacturer (and the carriers it serves) that expects to be unable to meet § 103's October 25, 1998 deadline to negotiate a reasonable time for compliance with the Department of Justice and the FBI on an individual basis. This solution to the alleged problem of carriers being unprepared to meet the § 103 deadline is fair to carriers, acceptable to law enforcement, and — most importantly — consistent with the language and structure of CALEA. These mechanisms for forbearance will be structured on a platform-by-platform (or solution-by-solution) basis, offering a pragmatic and sensible method for ensuring that the industry and law enforcement are able to get CALEA implemented as quickly as is reasonable and fair for all concerned.

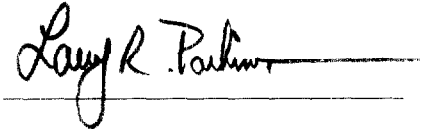
#### **IV. CONCLUSION**

34. It is essential to recognize that the industry-wide extension that petitioners have requested would have severe repercussions for the public interest in effective law enforcement. Any delay in the effective date of § 103's assistance capability obligations would mean a prolonged period during which law enforcement officers will be severely handicapped in their ability to fight crime through effective electronic surveillance. In the meantime, criminals are continuously becoming more adept at manipulating new telecommunications products and services to evade law enforcement's grasp. Bringing law enforcement into the 1990s, so that it can catch up with these criminals who perpetrate some of the most serious and socially devastating crimes, was the central purpose of CALEA. In fixing a date certain by which telecommunications carriers would begin offering the assistance

capabilities that law enforcement needs to apprehend these criminals, Congress recognized the crucial and time-sensitive nature of this goal. For this reason, Congress set the compliance date itself, provided its own mechanisms for easing compliance for members of the industry, and gave no authority to the Commission to override the scheme and grant an industry-wide extension of the compliance obligations. The Commission has no power to override Congress's deadline for compliance and substitute a new one that will unnecessarily push the achievement of CALEA's public safety goals years into the future.

DATE: May 8, 1998

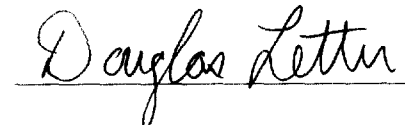
Louis J. Freeh, Director  
Federal Bureau of Investigation

A handwritten signature in cursive script, reading "Larry R. Parkinson", followed by a horizontal line.

Larry R. Parkinson  
General Counsel  
Federal Bureau of Investigation  
935 Pennsylvania Avenue, N.W.  
Washington, D.C. 20535

Respectfully submitted,

Honorable Janet Reno  
Attorney General of the United States

A handwritten signature in cursive script, reading "Stephen W. Preston", followed by a horizontal line.

Stephen W. Preston  
Deputy Assistant Attorney General

Douglas N. Letter  
Appellate Litigation Counsel

Scott R. McIntosh  
Daniel Kaplan  
Attorneys, Appellate Staff  
Civil Division  
U.S. Department of Justice  
601 D Street, N.W., Room 9106  
Washington, D.C. 20530  
(202) 514-3602

Before the  
Federal Communications Commission  
Washington, D.C. 20554

**Certificate of Service**

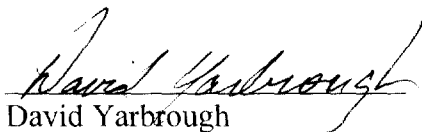
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In the Matter of: )

Communications Assistance for Law )  
Enforcement Act )  
\_\_\_\_\_ )

CC Docket No. 97-213

I, David Yarbrough, a Supervisory Special Agent in the office of the Federal Bureau of Investigation (FBI), Washington, D.C., hereby certify that, on May 8, 1998, I caused to be served, by first-class mail, postage prepaid (or by hand where noted) copies of the above-referenced Comments Regarding the Commission's Authority to Extend the October 25, 1998 Compliance Date, the original of which is filed herewith and upon the parties identified on the attached service list.

DATED at Washington, D.C. this 8<sup>th</sup> day of May, 1998.

  
David Yarbrough

**In the Matter of:**  
**Communications Assistance for Law Enforcement Act**

**Service List**

\*The Honorable William E. Kennard, Chairman  
Federal Communications Commission  
1919 M Street, N.W.-Room 814  
Washington, D.C. 20554

\*The Honorable Harold Furchtgott-Roth, Commissioner  
Federal Communications Commission  
1919 M Street, N.W.-Room 802  
Washington, D.C. 20554

\*The Honorable Susan Ness, Commissioner  
Federal Communications Commission  
1919 M Street, N.W.-Room 832  
Washington, D.C. 20554

\*The Honorable Michael Powell, Commissioner  
Federal Communications Commission  
1919 M Street, N.W.-Room 844  
Washington, D.C. 20554

\*The Honorable Gloria Tristani, Commissioner  
Federal Communications Commission  
1919 M Street, N.W.-Room 826  
Washington, D.C. 20554

\*Christopher J. Wright  
General Counsel  
Federal Communications Commission  
1919 M Street, N.W.-Room 614  
Washington, D.C. 20554

\*Daniel Phythyon, Chief  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street, N.W.-Room 5002  
Washington, D.C. 20554

\*David Wye  
Technical Advisor  
Federal Communications Commission  
2025 M Street, N.W.-Room 5002  
Washington, D.C. 20554

\*A. Richard Metzger, Chief  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, N.W.-Room 500B  
Washington, D.C. 20554

\*Geraldine Matise  
Chief, Network Services Division  
Common Carrier Bureau  
2000 M Street, N.W.-Room 235  
Washington, D.C. 20554

\*Kent Nilsson  
Deputy Division Chief  
Network Services Division  
Common Carrier Bureau  
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\*David Ward  
Network Services Division  
Common Carrier Bureau  
2000 M Street, N.W.-Room 210N  
Washington, D.C. 20554

\*Marty Schwimmer  
Network Services Division  
Common Carrier Bureau  
2000 M Street, N.W.-Room 290B  
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\*Lawrence Petak  
Office of Engineering and Technology  
Federal Communications Commission  
2000 M Street, N.W.-Room 230  
Washington, D.C. 20554

\*Charles Iseman  
Office of Engineering and Technology  
Federal Communications Commission  
2000 M Street, N.W.-Room 230  
Washington, D.C. 20554 Policy Division

\*Jim Burtle  
Office of Engineering and Technology  
Federal Communications Commission  
2000 M Street, N.W.-Room 230  
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Matthew J. Flanigan  
President  
Telecommunications Industry Association  
2500 Wilson Boulevard  
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Arlington, VA 22201-3834

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Albert Gidari  
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40<sup>th</sup> Floor  
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Alexandria, VA 22314-1561

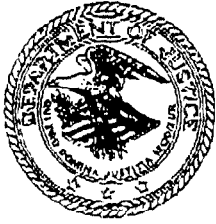
Roy Neel  
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Alliance for Telecommunication Industry Solutions  
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Washington, D.C. 20005

\*International Transcription Service, Inc.  
1231 20<sup>th</sup> Street, N.W.  
Washington, D.C. 20036

\* Jerry Berman  
Executive Director  
Center for Democracy and Technology  
1634 Eye Street, N.W.  
Suite 1100  
Washington, D.C. 20006

**\*HAND DELIVERED**



Office of the Attorney General  
Washington, D. C. 20530

JAN 22 1998

Mr. Matthew J. Flanigan  
President  
Telecommunications Industry Association  
2500 Wilson Boulevard  
Suite 300  
Arlington, VA 22201-3834

Dear Mr. Flanigan:

This letter responds to concerns expressed recently by members of the telecommunications industry with respect to the taking (or forbearance) of enforcement actions under the Communications Assistance for Law Enforcement Act (CALEA).

As you know, in enacting CALEA, Congress intended to preserve law enforcement's electronic surveillance capabilities and to prevent those capabilities from being eroded by technological impediments related to advanced telecommunications technologies, services, and features. To that end, Congress also specified that the solutions to overcome these impediments must be implemented within four years of the date of CALEA's enactment. The deadline for carriers to comply with section 103 of CALEA is October 25, 1998.

The Federal Bureau of Investigation (FBI) is working diligently with members of the industry, both individually and collectively, to ensure that the carriers and manufacturers are able to meet the deadline. In those situations where the carrier can foresee that it will not be able to meet the deadline because the manufacturer has yet to develop the solutions, the FBI is prepared to enter into an agreement with the manufacturer of the carrier's equipment wherein both parties (the FBI and a manufacturer) would agree upon the technological requirements and functionality for a specific switch platform (or other non-switch solution) and a reasonable and fair deployment schedule which would include verifiable milestones. In return, the Department will not pursue an enforcement action against the manufacturer or carrier as long as the terms of the agreement are met in the time frames specified. The Department will not pursue enforcement action against any carrier utilizing the switch platform (or non-switch solution) named in the agreement. Finally, the Department will support a carrier's petition to the Federal Communications

Mr. Matthew J. Flanigan  
Page 2

Commission (FCC) for an extension of the compliance date for the equipment named in the agreement and for the length of time specified in the agreement. Where an agreement has been signed, if a dispute arises between the manufacturer and the FBI which cannot be resolved, the manufacturer may appeal the issue directly to the Attorney General or her designate for prompt resolution.

Your continued willingness to work toward solutions which will support law enforcement's electronic surveillance requirements is greatly appreciated.

Sincerely,



Janet Reno

ATTACHMENT B



U.S. Department of Justice

FEB 3 1998

Washington, D.C. 20530

Mr. Tom Barba  
Stephoe & Johnson LLP  
Attorney at Law  
1330 Connecticut Avenue, NW  
Washington, DC 20036-1795

Dear Mr. Barba:

This letter confirms discussions held between the Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), and representatives of the telecommunications industry during a January 23, 1998, meeting<sup>1</sup> regarding DOJ's position on the legal status under the Communications Assistance for Law Enforcement Act (CALEA) of the 11 electronic surveillance capabilities (referred to as the "punch list") that are missing from the current Telecommunications Industry Association (TIA) electronic surveillance standard J-STD-025. Additionally, it confirms the terms and conditions upon which DOJ will forbear bringing enforcement actions against industry members for non-compliance with CALEA.

"Punch List"

DOJ has reviewed the 11 "punch list" capabilities in reference to CALEA, its legislative history, and the underlying electronic surveillance statutes<sup>2</sup>. In addition, DOJ reviewed a memorandum evaluating the "punch list" under CALEA that was prepared by the Office of General Counsel (OGC) of the FBI. As a result of its

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<sup>1</sup>Those in attendance at the January 23, 1998, meeting included representatives from the Cellular Telecommunications Industry Association (CTIA), Personal Communications Industry Association (PCIA), Telecommunications Industry Association (TIA), United States Telephone Association (USTA), Bell Atlantic, Department of Justice and the Federal Bureau of Investigation.

<sup>2</sup> CALEA was enacted to preserve the electronic surveillance capabilities of law enforcement commensurate with the legal authority found in the underlying electronic surveillance statutes, and so that electronic surveillance efforts could be conducted properly pursuant to these statutes.

review, DOJ is providing the following legal opinion: 9 of the 11 capabilities are clearly within the scope of CALEA and the underlying electronic surveillance statutes. These nine capabilities are<sup>1</sup>:

- Content of conferenced calls;
- Party Hold, Party Join, Party Drop;
- Access to subject-initiated dialing and signaling;
- Notification Message (in-band and out-of-band signaling);
- Timing to correlate call data and call content;
- Surveillance Status Message;
- Feature Status Message;
- Continuity Check; and
- Post cut-through dialing and signaling.

With respect to the first four capabilities (Content of conferenced calls; Party Hold, Party Join, Party Drop; Access to subject-initiated dialing and signaling; and Notification Message of in-band and out-of-band signaling), DOJ firmly believes that law enforcement's analysis and position regarding these assistance capability requirements satisfy CALEA section 103 requirements. These descriptions are set forth in the response submitted by the FBI<sup>4</sup> to TIA Committee TR45.2 during the balloting process on standards document SP-3580A.

With respect to the fifth through the ninth capabilities (Timing to correlate call data and call content; Surveillance Status Message; Feature Status Message; Continuity Check; and Post cut-through dialing and signaling), DOJ has also concluded that law enforcement's position satisfies CALEA section 103 requirements. Because of this opinion, discussion between the industry and law enforcement will be required in order to select a mutually acceptable means of delivering the information specified by each capability. Thus, if industry disagrees with law enforcement's proposed delivery method, it must affirmatively propose a meaningful and effective alternative.

Based upon the foregoing analysis, it is DOJ's opinion that TIA interim standard J-STD-025 is failing to include and properly address the nine capabilities listed above. Industry and law enforcement may wish to act in concert to revise the interim standard J-STD-025 to include solutions for each of these missing electronic surveillance capabilities.

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<sup>1</sup> See Items 1-7, 9, and 10 of Attachment A.

<sup>4</sup> The FBI is closely coordinating its efforts with state and local law enforcement representatives across the nation. In this document "law enforcement" and "FBI" refer to this partnership and are used interchangeably.

With respect to capability number eight (Standardized Delivery Interface), although a single delivery interface is not mandated by CALEA, DOJ believes that a single, standard interface would be cost effective and of great benefit to both law enforcement and telecommunications carriers. Recent productive discussions with industry have resulted in what DOJ believes is an acceptable compromise, whereby the industry would commit to a limited number of no more than five delivery interfaces. DOJ supports such an agreement.

With respect to capability number 11 (Separated Delivery), DOJ, while recognizing the usefulness of such delivery for the effectiveness of electronic surveillance, nevertheless does not believe that CALEA section 103, or the underlying electronic surveillance statutes, require separated delivery.

Building on the progress made during the final months of 1997, the FBI's CALEA Implementation Section (CIS) will continue to work with solution providers<sup>5</sup> to reach an agreement on the technical feasibility of all the CALEA capability requirements.

#### Forbearance

During the January 23, 1998, meeting, the parties discussed the conditions under which DOJ would agree not to pursue enforcement actions against the carrier under section 108 of CALEA with regard to the CALEA mandate that a carrier meet the assistance capability requirements pursuant to CALEA section 103 by October 25, 1998, or against a manufacturer with respect to its obligation under CALEA section 106(b) to make features or modifications available on a "reasonably timely basis." A letter from the Office of the Attorney General, which was provided to all meeting attendees, outlined the basic conditions regarding forbearance:

In those situations where the carrier can foresee that it will not be able to meet the deadline because the manufacturer has yet to develop the solutions, the FBI is prepared to enter into an agreement with the manufacturer of the carrier's equipment wherein both parties (the FBI and a manufacturer) would agree upon the technological requirements and functionality for a specific switch platform (or other non-switch solution) and a reasonable and fair deployment schedule which would include verifiable milestones. In return, DOJ will not pursue an enforcement action against the manufacturer or carrier as long as the terms of the agreement are met in the time frames specified. DOJ

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<sup>5</sup> Solutions providers include not only switch-based manufacturers, and support service providers, but other industry entities that are engaged in the development of network-based and other CALEA-compliant solutions.

will not pursue enforcement action against any carrier utilizing the switch platform (or non-switch solution) named in the agreement.

DOJ, in consultation with the FBI, has further elaborated on the conditions related to forbearance as follows:

Any member of the telecommunications industry seeking forbearance must submit to CIS a statement that identifies the following:

1. The CALEA capability requirements that will be included in its platform or designed into any non-switch-based solution.
2. The projected date by which the platform, or non-switch-based solution, will be made commercially available, the "commercially available date."
3. A timeline for design, development, and testing milestones that will be achieved by the manufacturer from the start of the project through the commercially available date, the "milestone timeline."
4. A schedule for furnishing information to CIS at each milestone to permit CIS to verify that a milestone has been reached.
5. A list of specific types of information to be provided according to the foregoing schedule.
6. A schedule for providing mutually agreed upon data to CIS from which the Government will be able to determine the fairness and reasonableness of the CALEA solution price.
7. A list of the specific types of price-related data to be provided.

With respect to item 1, the term "CALEA capability requirements" refers to the functions defined in the TIA interim standard J-STD-025 and the first nine punch list capabilities described earlier in this letter. Law enforcement will work with each solution provider as it produces a technical feasibility study to confirm its understanding of, and ability to meet, the CALEA capability requirements. For those switching platforms, or non-switch-based solutions, on which a capability is technically infeasible, law enforcement will consult with solution providers to assess the possibility of providing effective technical alternatives that will still provide law enforcement with the necessary evidentiary and minimization data sought by the capability.

With respect to item 2, the term "commercially available date" refers to the date when the platform or non-switch-based solution

will be made available by the solution provider for the immediate purchase and deployment by a carrier. That date shall, in no event, extend beyond the first currently scheduled software generic product release after the October 25, 1998, capability compliance date. With respect to item 3, the term "milestone timeline" refers to a schedule of the necessary design, development, and testing steps to be taken by a solution provider in making a product commercially available. With respect to item 4, a solution provider is expected to include a schedule specifying the time after the completion of each milestone when CIS will be able to verify that the milestone has been reached. With respect to item 5, the specific types of information contained in the affirmative confirmation of the foregoing schedule will include, but not be limited to, draft design documents, feature specification documents, and test results. With respect to item 6, a solution provider is expected to provide a schedule detailing the delivery to CIS of all necessary information for the government to make a determination of the fairness and reasonableness of the price of the solution provider's commercially available CALEA solution. With respect to item 7, the specific types of information contained in the price-related information of the foregoing schedule will include, but not be limited to, market prices of comparable features with similar levels of design, development, and testing effort.

Forbearance for a solution provider, and its carrier customers, will be conditioned upon its ability to provide the above listed items as well as to meet verifiable solution development milestones. A solution provider's failure to meet these milestones will result in the loss of forbearance for the solution provider.

Carrier forbearance ends with the commercial availability of a solution. Switches, or portions of a network, of historical importance to law enforcement for which the government must reimburse the carrier will be identified by CIS. Equipment, facilities, and services installed or deployed after January 1, 1995, will be included in any forbearance until a solution is commercially available. Following solution availability, for those switches or portions of a network not identified by CIS, carriers are expected to follow their normal deployment processes in determining which switches, or portions of their networks, will be upgraded with the CALEA capabilities. Figure 1 illustrates the basic elements of forbearance.

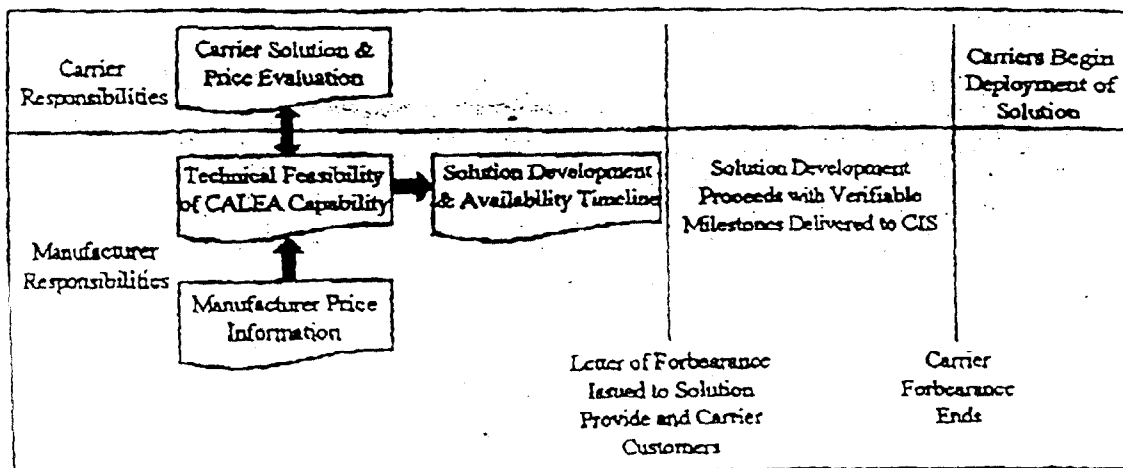


Figure 1: Forbearance

The foregoing forbearance discussion centers on two separate and distinct agreements: Agreements in Principle (AIP) between the FBI and a solution provider, and Cooperative Agreements between the FBI and a carrier.

In an AIP, the FBI and solution providers agree that solution providers have complied with the seven criteria listed above, including a feasibility analysis and pricing information for CALEA capability requirements. The feasibility analysis and pricing information will allow the government to finalize its position regarding the standard, extension of the compliance dates, forbearance, etc. The FBI, in consultation with law enforcement, will not be in a position to make critical determinations until the information described in the above seven criteria has been provided.

Currently many versions of draft AIPs are circulating, both FBI- and industry-generated, and some are more comprehensive than is presently warranted. Some of the AIPs in circulation were derived from an AIP drafted by TIA. The FBI hopes to meet with TIA during the week of February 2, 1998, to discuss the proposed AIP. The results of these discussions will then be disseminated to TIA's membership and any other interested solution provider.

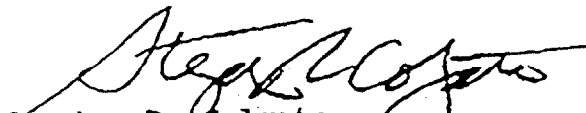
The Cooperative Agreement, on the other hand, is the contractual vehicle whereby telecommunications carriers will receive reimbursement for their eligible CALEA costs. Cooperative Agreements may be executed for different purposes at different stages of CALEA implementation. For example, an initial round of Cooperative Agreement negotiations is taking place to establish contractual vehicles whereby carriers selected to support specific solution providers with the feasibility analyses and pricing information may receive reimbursement for assisting in

this effort. Unfortunately, this initial round of negotiations has encountered some problems. One of the issues is the clarification of a carrier's role in assisting in the analysis of the solution provider's proposed solution. It appears from discussions with carriers that a mutual understanding of the intent of the government's proposed language for the Cooperative Agreements and its Statement of Work (SOW) does not yet exist. Carriers commented that the SOW included a consultative role that the carriers are unable or unwilling to perform. Although it was the government's intent to construct an SOW flexible enough to allow carriers to accommodate their normal roles in the solution provider product development process, the proposals received in response to the SOW have been too non-specific to provide real value.

The FBI still believes, and has had it confirmed by solution providers, that carriers have an essential role to play in developing the CALEA solution. The FBI will now request that each solution provider describe in detail the typical interaction it might have with one of its carrier customers during new product development. These descriptions will then be incorporated into the proposed SOWs, which the government will seek from carriers.

Your continued willingness to work with law enforcement toward the development of electronic surveillance solutions is greatly appreciated.

Sincerely,



Stephen R. Colgate  
Assistant Attorney General  
for Administration

**ATTACHMENT A**

**BRIEF DESCRIPTION OF PUNCH-LIST CAPABILITIES**

<b>Number</b>	<b>Name</b>	<b>Description</b>
1	Content of subject-initiated conference calls	Capability would enable law enforcement access to content of conference calls supported by the subject's service (including the call content of parties on hold).
2	Party Hold, Join, Drop	Messages would be sent to law enforcement that identify the active parties of a call. Specifically, on a conference call, these messages would indicate whether a party is on hold, has joined or has been dropped from the conference call.
3	Access to subject-initiated dialing and signaling	Access to all dialing and signaling information available from the subject would inform law enforcement of a subject's use of features. (Examples include the use of flash-hook, and other feature keys.)
4	In-band and out-of-band signaling (Notification Message)	A message would be sent to law enforcement when a subject's service sends a tone or other network message to the subject or associate. This can include notification that a line is ringing or busy.
5	Timing to associate call data to content	Information necessary to correlate call identifying information with the call content of a communications interception.
6	Surveillance Status Message	Message that would provide the verification that an interception is still functioning on the appropriate subject.
7	Continuity Check (C-Tone)	Electronic signal that would alert law enforcement if the facility used for delivery of call content interception has failed or lost continuity.
8	Standardized delivery interface	Would limit the number of potential delivery interfaces law enforcement would need to accommodate from the industry.
9	Feature Status Message	Message would provide affirmative notification of any change in a subject's subscribed-to features.
10	Post cut-through dialing and signaling	Information would include those digits dialed by a subject after the initial call setup is completed.
11	Separated delivery	Each party to a communication would be delivered separately to law enforcement, without combining all the voices of an intercepted (conference) call.